DEFEND THE BAY **NATURAL RESOURCES DEFENSE COUNCIL**

June 30, 2003

Mr. Gerard Thibeault
Executive Officer
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

Re: NPDES permit for Orange County, Order No. 01-20 (NPDES No. CAS 618030), County's DAMP Section 7 and WQMP

Dear Mr. Thibeault:

On behalf of Defend the Bay and the Natural Resources Defense Council, we wish to submit the following comments on the County of Orange's submittal of a proposed program regarding new and redevelopment (DAMP Section 7). We also incorporate by reference the comments of Dr. Richard Horner regarding these matters, which are being submitted under separate cover.

As a general matter, we agree with nearly all of staff's comments regarding the new and redevelopment submittal ("DAMP"). Staff has done a careful and incisive job in evaluating the submittal. We do not reiterate those comments here, but we wish to indicate our agreement with staff's identification of many problems with the current proposal. In addition, we have important concerns to add to those contained in staff's May 21, 2002 comment letter to the County. We believe that additional changes are required before the new and redevelopment proposal by the County can be approved as adequate under the permit.

We have listed our comments below in connection with the section of the DAMP to which they correspond. We have three initial, general comments.

First, the manner in which the County prepared these documents violated (and continues to violate) the Permit and the Clean Water Act. Specifically, the Permit required the County to "[o]btain public input for any proposed management and implementation plans, where applicable." Permit at § I, ¶ 10 (page 15). However, the County identified a "task force" nearly exclusively comprised of dischargers to help it prepare Section 7 of the DAMP. Proposed DAMP 7-4. No public interest or similar organization participated, even though many have as much or more experience with the SUSMP provision as any entity in California. The County's "task force" notably included special interests that have strenuously fought "SUSMP" provisions, including

the BIA and the Western States Petroleum Association. *Id.* Some of these entities are now litigating the SUSMP requirement in court.

There is no excuse for providing special access to SUSMP opponents when public management plans are being devised, and it is a legal violation to do so when the Permit commands otherwise. The Regional Board should take appropriate action to rectify this Permit violation and to assure that similar violations do not occur in the future.

Second, the County misapprehends the legal standards that it (and its copermitees) must meet in implementing Section XII of the Permit (new and redevelopment). The County **repeatedly** refers to the Maximum Extent Practicable standard to **qualify** a more general requirement or expectation. For example, with respect to the "Model Program Requirements and Objectives," the County states that "each permittee is required to minimize short and long-term impacts on receiving water quality from new development and significant redevelopment to the maximum extent practicable…." Proposed DAMP at 7-5. However, in addition to meeting the MEP standard, the County must assure, among other things, that discharges do not cause or contribute to a violation of water quality standards. Permit § IV. The Permit emphasizes that this compliance is to be achieved in part by calibrating the DAMP to meet water quality standards: "[t]he DAMP and its components shall be designed to achieve compliance with receiving water limitations." *Id.* at ¶ 2. There is no indication that the County has even considered how this section of the DAMP will assure consistency with water quality standards.

The County's failure to implement and acknowledge these requirements is quite blatant. It is also highly consequential for the substance of proposed Section 7 of the DAMP. Notably, the County proposed many exceptions and limitations in its new and redevelopment submittal (as discussed herein, in Staff's comments, and in the attached comments from Professor Horner) that are inconsistent not only with MEP but more fundamentally with the mandate that the DAMP be designed to "achieve compliance with receiving water limitations." **These include targeting the program conceptually to address only individually "significant" hydrological alterations and pollutants now impairing water quality (as opposed to those that have the reasonable potential to cause or contribute to violations now and in the future)**.

Third, the County appears to be submitting not only its "SUSMP"-related program for approval (Permit § XII.B) but also its more general new and redevelopment program, as required by Permit Section XII.A. If so, this submittal fails to address the majority of Section XII.A substantively nor does it contain specific model guidelines. Rather, the proposed Section 7 of the DAMP generally lists factors that permittees (including the County itself) may wish to consider when reviewing their respective general plans and CEQA processes. In these ways, the County implies that a program implementing Section XII.B of the Permit is tantamount to a complete new and redevelopment plan satisfying Section XII of the Permit. This is incorrect.

Comments on Specific Aspects of Proposed Section 7

Section 7.4: The entirety of the DAMP's discussion of general plan revision (Permit § XII.A.4) consists of vague references to the existing provisions of the permittees' general plans and recapitulation of the requirements of the Permit. This does not constitute a "model program," let alone an adequate one. Furthermore, Section 7.4.3 invites the permittees to make little or no change to the existing plans, noting that a few wording changes may be all that is necessary and that inland cities in particular may need not make any changes. In these respects, the DAMP is inconsistent with the letter and spirit of the Permit and, if followed, simply would lead the permittees down a pathway to non-compliance with the Permit and the Clean Water Act.

Subsection A of the Permit's new and redevelopment requirements are critical elements of the Permit as a whole. However, the Proposed DAMP, with no discussion and no guidance, has effectively dismissed them.

Section 7.5.2.2: The County reports that the permittees have concluded that "urban runoff and stormwater pollution considerations are generally covered" in the CEQA Guidelines. The pertinent CEQA Guidelines are far less specific than the permit considerations and do not directly specify the same substantive standards. For example, the Guidelines refer to "substantial" changes to various water quality-related factors as a triggering event, whereas the Permit recognizes that many individually smaller changes can (and do) result in substantial water-related degradation. The Proposed DAMP is simply incorrect in failing to commit to major additions to the project review criteria. No reasonable person could consider the Guidelines and Permit Section A.3 as being interchangeable.

Section 7.6.2: The Proposed DAMP creates two major project categories, Priority and Non-Priority. A number of aspects of this approach are unclear and of concern. Most generally, the approach appears to provide treatment/infiltration BMP exemptions for projects that meet Permit Section XII.B criteria. *See* 7-24 (first and second bullets). There is no basis in the Permit for categorical exemptions and, in any case, the basis for this approach appears entirely arbitrary. This is inconsistent with the Permit.

Second, the Proposed DAMP further carves out a large category of development and redevelopment that does not meet the "priority" or "non-priority" requirements. As a consequence, it appears that many projects within the County will proceed without any consideration of storm water pollution reduction, contrary to the intent and structure of Section XII of the Permit. (This is evident from the fact that "non-priority" projects are not comprised solely of those that do not meet "priority" definitions. Rather, non-priority projects must also meet certain criteria.) This entire approach is inconsistent with the Permit and totally unsupported and unjustified in the Proposed DAMP.

Further, with respect to redevelopment projects, there is no basis articulated for exempting those that result in the addition of less than 50% of the previously existing impervious surface from preparing a site-wide WQMP. What is the basis for selecting 50% as a standard? It is, again, totally arbitrary—and very high. The Proposed DAMP would allow large increases in impervious surface, in both absolute and relative terms, without addressing the entire site. As Dr. Horner notes in his accompanying letter, this is not consistent with the Permit or with basic storm water reduction principles. Furthermore, one can see how 49% increases in impervious surface will become the goal in many redevelopment scenarios, frustrating the intent of the Permit.

Finally in this regard, there is no stated basis for the categorical public agency project exemptions set forth on page 7-28 of the Proposed DAMP. Yet again, this is not consistent with the Permit and no substantive basis is articulated for these proposed loopholes drafted by the County and its one-sided "task force."

Section 7.II-3.3.3: With respect to regional storm water facilities, we believe staff has articulated many important problems with the proposal. In addition, we note that because the permitttees have not submitted any regional facilities to the Regional Board for approval, nor submitted a proposed modification of Section XII.B, there is no basis whatsoever for any project-level exemption process in the proposed DAMP. This is a classic "cart before the horse" scenario, and it is not compliant with the Permit.

The entire framework of the proposed Model WQMP, in particular, relies on an assumption that regional facilities will be available and approved, which may or may not happen. In each place where the Proposed DAMP or Model WQMP refers to such an option, the Regional Board should strike the reference pending the approval of any alternative program.

Section 7.II.1: The Model WQMP exempts so-called "non-priority" projects from a number of storm water pollution reduction approaches, in particular, site design BMPs. There is no stated basis for this exemption. This is inconsistent with the Permit. Site design BMPs are practicable and in use throughout the country. Often, they result in developments that are more aesthetically designed and achieve broader public acceptance. There is no reason not to require use of this class of BMPs.

Section 7.11-3.2.3: A basic aspect of the framework for selecting treatment BMPs de-emphasizes pollutants not listed on the current Section 303(d) List. While we agree that impairing pollutants present special concerns, this framework is flawed. First, as it stands, no net increases of impairing pollutants may be discharged pursuant to the Clean Water Act. Second, pollutants not listed on the current Section 303(d) List cannot be legitimately viewed as of "secondary" concern.

The Permit does not allow the County to downgrade a broad set of pollutants in favor of those on the Section 303(d) List; rather, it requires the County to reduce pollutants

generally. The purpose of the SUSMP provision, in particular, is to prevent new impairments and reduce existing ones. This cannot be achieved by a narrow focus on the Section 303(d) List, which sets forth many of the worst existing problems in the County, not those that are emerging or may emerge as development and population increase over time. In this regard, there is no basis for the County to once again propose to exempt certain pollutants, such as TDS, salinity, and chlorides, because they are not "commonly" of concern in development projects. This is neither accurate factually nor consistent with the Permit.

Section 7.II-3.2.4: Continuing a theme of designing a program with major exemptions, the County proposes that hydrological changes should be considered "of concern" only if they would have a "significant" impact on downstream conditions. Once again, projects that by themselves create "significant" impacts are, of course, of concern; however, the storm water permit recognizes that impacts from urban runoff are often created by the interaction of many smaller changes. It is totally inconsistent with this well-established factual reality (one recognized by the Regional Board and the SWRCB) and the Permit's requirements to limit consideration only to "significant" impacts.

Section 7.II-6: The Proposed Model WQMP does not provide that any site-specific waiver that may be issued should be accompanied by an offset requirement. Consistent with the MEP standard, any project that appropriately obtains a waiver should do something to assure that storm water pollution is being reduced. It is inappropriate not to require offsets. Further, there is no articulated basis for granting project-specific waivers. How will permittees make this decision?

Thank you for considering our comments. We request that the Regional Board assure that a revised draft of Section 7 of the DAMP, including the Model WQMP, be circulated well before this matter reaches the Board for approval. We are very concerned that the County and its one-sided "task force" have failed to propose an adequate approach to Section XII.B of the Permit (and Section XII.A). This element of the Permit is one of the most critical. It is imperative that the approved Program be fully adequate to protect water quality as Orange County grows.

Sincerely,

David S. Beckman
Senior Attorney

cc: Mr. Robert Caustin, Defend the Bay